

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 PERSONALIZED MEDIA
5 COMMUNICATIONS

6 VS.

7 ZYNGA, INC.

* Civil Docket No.
* 2:12-CV-68
*
* Marshall, Texas
*
* November 15, 2013
* 8:00 A.M.

8 TRANSCRIPT OF JURY TRIAL
9 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

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34 (Proceedings recorded by mechanical stenography,
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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

Is the Plaintiff ready to read into the
record any additional exhibits from the list of
pre-admitted exhibits that were used before the jury
during yesterday's portion of the trial?

MR. HILL: Yes, Your Honor.

THE COURT: Proceed.

MR. HILL: Your Honor, I believe we only
have two to add to the list from what had been offered

1 previously in the trial. It's Plaintiff's Exhibit 455
2 and then Defendant's Exhibit 356. And we have a -- I
3 think both sides have exchanged and we'll have a
4 complete list, if the Court would like hard copies of
5 the final lists.

6 THE COURT: I'm sure Ms. Lockhart will be
7 after you to get that.

8 MR. HILL: Thank you, Your Honor.

9 THE COURT: Any objection to the
10 Plaintiff's rendition from the Defendants?

11 MS. JOHNSON: No, Your Honor.

12 THE COURT: All right. Does Defendant
13 have their list of additional exhibits to read into the
14 record?

15 MS. JOHNSON: Yes, Your Honor. Kellie
16 Johnson from Akin.

17 We wish to admit Plaintiff's Exhibit 34,
18 Defendant's Exhibit 28, Defendant's Exhibit 166,
19 Defendant's Exhibit 356, Defendant's Exhibit 678,
20 Defendant's Exhibit 1052, and Defendant's Exhibit 10 --
21 1087.

22 THE COURT: All right. Any objection to
23 that list from the Plaintiff?

24 MR. HILL: No, Your Honor.

25 THE COURT: All right. Those exhibits

1 are duly noted as a part of the record in this case.

2 Also, Counsel, I'm informed that the
3 parties have an agreement among themselves that deviates
4 from the usual pretrial order on exchanging slides prior
5 to closing. If that's the case, let me hear from
6 counsel on that.

7 MR. ZAGER: Your Honor, Steve Zager for
8 Zynga.

9 We inquired as to whether the Court would
10 be willing to vary its normal procedure if the parties
11 were in agreement, and I think the parties may have an
12 agreement that they do not wish to exchange slides in
13 advance of the closing if that's all right with the
14 Court.

15 THE COURT: What's the Plaintiff's
16 position on that?

17 MR. HILL: We're in agreement, Your
18 Honor.

19 THE COURT: Well, I once heard a wise
20 judge say we're in the business of settling disputes and
21 not settling agreements, so that will be -- that will be
22 acceptable.

23 MR. ZAGER: Thank you, Your Honor.

24 THE COURT: All right. At this time,
25 I'll hear motions under Rule 50(a) for judgment as a

1 matter of law.

2 Mr. Zynga, if you'd like to go -- Zager,
3 if you'd like to go first. Excuse me. You are kind of
4 Mr. Zynga after all we've heard.

5 MR. ZAGER: I kind of like that, Your
6 Honor. It's rare that I hear a name that follows mine
7 in alphabetical order, so...

8 THE COURT: When you're ready.

9 MR. ZAGER: Thank you.

10 May it please the Court. Steve Zager for
11 Zynga.

12 Zynga asks this Court to enter judgment
13 as a matter of law of non-infringement for all of the
14 asserted claims under Federal Rule of Civil
15 Procedure 50(a).

16 I want to start with no evidence of
17 direct infringement. PMC has failed to introduce
18 evidence sufficient for a reasonable jury to find that
19 any of the asserted claims are directly infringed.

20 First, with respect to Claims 1, 4, and 7
21 of the '717 patent, PMC has failed to show that Zynga's
22 games perform the step of generating a benefit datum at
23 a player's device as required by independent Claim 1.

24 At best, PMC provided evidence that the
25 benefit datum is displayed on the user's device.

1 Displayed on the user's device is not the
2 same thing as generated on the user's device.

3 And displaying the benefit datum is
4 actually covered by delivering that step of the claim
5 and not in the step we were talking about.

6 So because Claim 1 is not directly
7 infringed, dependent Claims 4 and 7 are also not
8 infringed.

9 Second, with respect to Claims 1, 3, and
10 6 of the '638 patent, PMC has failed to show that
11 Zynga's games perform the steps of the claims relating
12 to second data and second subscriber station.

13 In particular, PMC has failed to show
14 that the things it's calling second data are, number
15 one, computed at the user's device; two, displayed on
16 the user's device; and three, transferred to Zynga's
17 servers as required by Claims 1 and 6.

18 The evidence from Zynga's fact witnesses
19 conclusively prove that Zynga's games do not work the
20 way that PMC has alleged, and there has been no evidence
21 to the contrary beyond opinion testimony.

22 Because Claim 1 is not directly
23 infringed, dependent Claim 3 is not infringed.

24 Third, PMC completely failed to show that
25 Zynga's servers meet the transmission station element of

1 Claim 6 of the '638 patent.

2 Now, according to the claim, the
3 transmission station must have a programmable
4 controller. PMC's expert provided no evidence that
5 Zynga's servers include a programmable controller.
6 Moving now to indirect infringement.

7 PMC has also failed to introduce evidence
8 sufficient for a reasonable jury to find that Zynga
9 indirectly infringed any of the asserted claims.

10 First, as the Court is well aware, there
11 can be no indirect infringement because there is no
12 direct infringement.

13 But second, and very importantly, there
14 is no evidence that Zynga had the requisite knowledge
15 and intent to directly infringe -- to indirectly
16 infringe. I'm sorry, Your Honor.

17 Both induced infringement and
18 contributory infringement require knowledge of the
19 patent and knowledge of the acts that constitute patent
20 infringement. Knowledge of the patent and knowledge of
21 the acts that constitute patent infringement. And
22 that's the Global Tech case in 2011.

23 Here's the thing in this case: There is
24 no evidence that Zynga had the requisite knowledge for
25 indirect infringement. It is undisputed that Zynga had

1 no presuit intent because Zynga didn't know about the
2 asserted patents until Zynga was sued.

3 With respect to post-suit conduct, PMC
4 did not put on any evidence at all that Zynga had the
5 requisite intent.

6 Dr. Claypool testified only that Zynga
7 encouraged people to play its games. Zynga's witnesses
8 testified only that they encouraged people to play the
9 games. But no one put on any evidence at all that Zynga
10 knew that playing the accused games constituted
11 infringement of the PMC patents.

12 This is insufficient as a matter of law
13 pursuant to the Supreme Court's 2011 opinion in Global
14 Tech.

15 Now to contributory infringement.

16 PMC's failed to show that Zynga sells or
17 offers to sell a product, as required, to prove
18 contributory infringement.

19 Under Federal Circuit law providing a
20 service that assists another in committing patent
21 infringement is not contributory infringement.

22 The Pharmastem Therapeutics case from the
23 Federal Circuit in 2007: Providing a service may
24 constitute induced infringement if all of the inducement
25 requirements are met, but it cannot constitute

1 contributory infringement because the contributory
2 infringement statute requires sale or offer for sale.

3 PMC has introduced no evidence that Zynga
4 sells or offers to sell its gaming software to anyone.
5 So PMC's contributory infringement fails as a matter of
6 law.

7 While Zynga provides the games, as
8 Dr. Claypool testified, providing the games is not the
9 same as selling the software. And that's an important
10 distinction when it comes to whether or not PMC's
11 contributory infringement claim should be resolved by
12 this Court as a matter of law.

13 In conclusion, with respect to
14 infringement, Zynga requests that the Court enter
15 judgment as a matter of law of non-infringement as to
16 all the asserted claims; Claims 1, 4, 7 of the '717
17 patent; Claims 1, 3, and 6 of the '638 patent.

18 Turning now to damages, two points there.
19 Defendant also moves for judgment that the Plaintiff's
20 damages claim is improper as a matter of law and that
21 the Plaintiff has presented insufficient evidence of an
22 admissible damages theory.

23 I want to start with the scant comment we
24 heard about a running royalty. All we heard was that
25 PMC wants a running royalty. There is no evidence in

1 this record to support a running royalty at all.

2 And consequently, we believe the evidence
3 that appears in the record is indeed all to the
4 contrary. Mr. Holtzman testified that PMC agrees to
5 lump-sum royalties 99 times out of a hundred. All of
6 Zynga's past licenses were all lump sum. There's just
7 nothing in this record to talk about a running royalty
8 at all, only a lump-sum royalty.

9 And second, PMC has failed to present the
10 necessary evidence of apportionment required to assess
11 the damages correctly in this case.

12 We have some other arguments about
13 damages, and I'm going to reserve those for the briefing
14 that we're going to file on Monday.

15 In addition, the briefing we'll file on
16 Monday will flesh out the arguments I've made here as I
17 stand before you today and provide more of the case law
18 support and citations to the record.

19 But we think these issues are important,
20 and I highlighted the important ones for you today, and
21 we believe that we are entitled to judgment as a matter
22 of law on those issues I've discussed this morning.

23 Thank you, Your Honor.

24 THE COURT: Mr. Zager -- Zager, certainly
25 you have leave of the Court to file a written rendition

1 of this motion for judgment as a matter of law, and I
2 have no problem with that being filed either over the
3 weekend or on Monday, given that we will not charge the
4 jury and instruct them to retire to deliberate until
5 Monday afternoon.

6 However, if you're moving for judgment
7 pre-verdict as a matter of law, I can't very well
8 consider anything separate that you're going to file in
9 your written version that you're not presenting to me
10 orally this morning, because the jury's going to be
11 retiring to deliberate before I'll probably see your
12 written version.

13 So if you want me to consider it for Rule
14 50(a) purposes, I need to hear it. If you want to
15 retain it for later submission post-verdict, that's your
16 choice. But I don't want you to be under the
17 misunderstanding that you might be entitled to
18 consideration by the Court on some different theory that
19 you're not presenting to me now on a post -- on a
20 pre-verdict basis.

21 MR. ZAGER: With that understanding, with
22 leave of the Court, I would amend my comments for you
23 this morning and talk about some other theories on the
24 damages aspects of the case --

25 THE COURT: Okay.

1 MR. ZAGER: -- that we would like the
2 Court to consider. I think I've covered all of the
3 bases for JMOL on the infringement case, and I think all
4 we would do in written papers is provide the Court with
5 more case authority.

6 THE COURT: That's what I'm anticipating.
7 I want to hear everything, but if you want to augment
8 the arguments you present today in written version
9 later, that's not a problem.

10 MR. ZAGER: Terrific. I will turn now,
11 then, to Dr. Becker's royalty rate.

12 Dr. Becker's royalty rate of 2 percent is
13 not supported by the evidence. PMC's own documents
14 demonstrate a much lower royalty rate offered in a
15 hypothetical negotiation. Dr. Becker used a starting
16 point of 4 percent, which he dropped to 2 percent,
17 calculating a hypothetical license for two patents.

18 But PMC's own documents in the case show
19 potential ranges from only .25 percent to .5 percent in
20 offers and projections. Indeed, for the Sony license,
21 PMC uses the starting point of .35 percent, totaling 181
22 million, but ended up licensing its entire portfolio to
23 Sony for only 26 million, a fraction of that.

24 So there's simply no evidence PMC would
25 have offered and Zynga would have accepted a 2-percent

1 royalty rate.

2 Second, Dr. Becker's reliance on the
3 Overture license was inappropriate as a matter of law as
4 the agreement was not comparable. The Overture license
5 related to search engines, not online gaming.

6 Dr. Becker uses these licenses in search
7 engine cases.

8 Mr. Holtzman testified that PMC and its
9 licensees have never used the Overture patents. In
10 addition, PMC inappropriately offered evidence of the
11 amounts and details of licenses that were deemed not
12 comparable by both experts. Mr. Holtzman took the stand
13 and discussed the amounts and terms that Cisco,
14 Motorola, and DirecTV paid to PMC to imply legitimacy to
15 the company in its patents.

16 However, PMC's own damages expert
17 determined that those agreements were irrelevant to a
18 damage analysis.

19 Finally, Dr. Becker admitted that he had
20 only excluded non-infringing revenues, meaning all that
21 was left was 100 percent of allegedly infringing
22 revenues. Dr. Becker excluded gift cards, because they
23 were outside the game architecture. Dr. Becker excluded
24 ad revenues with no direct connection to infringement.

25 Dr. Becker, Dr. Claypool, and

1 Mr. Holtzman all admitted that other features of Zynga's
2 games have contributed to Zynga's success. To use 100
3 percent of the revenues, Dr. Becker had to demonstrate
4 that the patented features drove consumer demand, but
5 admitted that he conducted no studies, no surveys, had
6 no evidence whatsoever to measure consumer demand for
7 the allegedly infringing features.

8 And with that, Your Honor, I believe that
9 I've hit upon every issue that we intend to raise with
10 the Court as a basis for a judgment as a matter of law.

11 THE COURT: All right. Thank you,
12 Mr. Zager.

13 Response from the Plaintiff, please.

14 MR. HALL: Your Honor, Eric Hall for PMC.

15 THE COURT: Proceed.

16 MR. HALL: And I'll be responding with
17 regard to direct infringement.

18 To prove direct infringement, the
19 Plaintiff must show the presence of every element in the
20 accused devices or processes. Determining infringement
21 is a two-step process. First, the claim must be
22 properly construed, and secondly, the claim as construed
23 must then be compared to the accused device or process.

24 A determination of infringement is a
25 question of fact that's reviewed for substantial

1 evidence and tried to a jury.

2 A reasonable jury would have a legally
3 sufficient evidentiary basis to find for PMC on the
4 issue of direct infringement as to each asserted claim
5 as applied to each accused game, both direct
6 infringement by the players of Zynga's games and by
7 Zynga itself.

8 PMC has substantial evidence by the
9 players of Zynga's games as well as by Zynga itself
10 through testing. Dr. Claypool testified discussing
11 testimony by Zynga that testing is of the utmost
12 importance and that Zynga tests every new game and every
13 new feature.

14 And Zynga's employee, Ben Hall, agreed,
15 saying he would be shocked if any game was ever released
16 without having ever -- every aspect of it tested.

17 Mr. Carroll then testified that more than
18 half of their testing occurs in the United States.

19 Dr. Claypool presented substantial
20 evidence showing how game play infringes the accused
21 games. And Mr. Bakewell, Zynga's own expert, agreed
22 that Zynga has a hundred million monthly, average,
23 people playing those games.

24 Now, Dr. Claypool considered a number of
25 games indepth during his nearly four hours of testimony.

1 CityVille, for '638, Claims 1 and 3, going through each
2 and every element; Words with Friends, '638, Claim 1,
3 again, going through each and every element; FarmVille
4 for '638, Claim 6, each and every element; CastleVille
5 for '717, Claims 1, 4, and 7; and Zynga Poker '717,
6 Claims 1, 4, and 7; again, each and every element for
7 both of those games.

8 Dr. Claypool demonstrated infringing game
9 play. He discussed the testimony of Zynga corporate
10 representatives. He showed Zynga documents. He showed
11 multiple screenshots taken of Zynga games and he showed
12 and discussed Zynga's source code.

13 And with regard to each step of each of
14 those games, he presented such evidence.

15 For the other accused games, Dr. Claypool
16 explained that he performed the same analysis, and he
17 explained for each claim and each element how those
18 other games infringed the claims in the same way as the
19 games he had covered earlier.

20 Dr. Claypool testified he considered the
21 same evidence for each game. His personal playing of
22 the games, Zynga's source code, Zynga's documents,
23 Zynga's deposition testimony.

24 Zynga did not point out any differences
25 in those games but, in fact, turned the argument around.

1 With Dr. Schaefer repeatedly saying if
2 one game did not infringe, then the others did not
3 infringe either. And that would be true only if the
4 games operated in the same way for the accused features.

5 And, in fact, Ben Hall testified to
6 effect, another Zynga witness, saying that the 'Ville
7 Browser games operate with a common code base, and
8 Dr. Schaefer agreed.

9 Question to Dr. Schaefer: Now, when on
10 the stand, Dr. Claypool said that the other 'Ville games
11 operated in a similar manner when it came to the
12 placement of objects in the game. Do you recall that?

13 ANSWER: Yes, I do.

14 QUESTION: Do you agree with that?

15 ANSWER: They have similar functions to
16 determine where their object can be placed. Yes, he
17 said.

18 Zynga did not argue that the accused
19 games did not function in the manner that Dr. Claypool
20 discussed in his summary slides, but instead Zynga
21 argued only that the accused functionality described in
22 the summary charts does not infringe.

23 Dr. Claypool was asked: And have you
24 analyzed these additional games in the same way that you
25 did FarmVille?

1 He said: Yes. I did the exact type of
2 analysis.

3 You looked at the source code?

4 Dr. Claypool said yes.

5 And have you played these games?

6 He said: Yes, I played all of these
7 games.

8 Have you looked at Zynga's documents?

9 Dr. Claypool said: Yes. I've looked at
10 numerous Zynga documents.

11 And you've read testimony by Zynga
12 employees?

13 Dr. Claypool said: Yes, I have.

14 Now, turning to the particular items that
15 Mr. Zager mentioned. With regard to '717, Claim 1,
16 generating a benefit datum at the player's device, the
17 confusion that -- on Zynga's part here is that the offer
18 is not the same as the screen.

19 And Dr. Claypool repeatedly referred to
20 the offer as what is generated. It includes the -- the
21 screen in the sense that that's a display of the offer,
22 but it's the offer that's the benefit datum.

23 And as Mr. Zager correctly pointed out,
24 the generating occurs before the delivering. So there's
25 something happening before the display. And

1 Dr. Claypool repeatedly referred to it as the offer.

2 And, in fact, for the summary chart, he
3 talked about the offer for the item as needed. And as
4 with something that happens at the player's device,
5 Dr. Claypool explained that it's that as needed that
6 that offer is not going to be generated, if it's not
7 needed.

8 And so that's something that's happening
9 as the player is playing the game, and that's what
10 Dr. Claypool explained throughout his testimony for each
11 of the games.

12 For the second item that was mentioned,
13 the second data, again, Dr. Claypool went through each
14 game and his -- and showed that second data includes
15 that valid chosen move, whether it's circled by a green
16 square as in the 'Ville games or it's indicated by the
17 placement of the tiles in Words with Friends or it's
18 indicated by the bet in the Poker game.

19 It's the valid chosen move, and that
20 valid chosen move is computed, it is displayed, and it
21 is transferred. And Dr. Claypool showed that in video
22 games played to the jury, and he showed that by looking
23 at source code when explaining that to the jury.

24 And the third item that was mentioned was
25 the programmable controller for the transmission

1 station. And, again, Dr. Claypool testified with regard
2 to the FarmVille game, and then for each game, he also
3 referred to that element that it was present in the
4 server. And he testified that that element was
5 satisfied by the game.

6 So there is sufficient substantial
7 evidence for each of the claim elements that
8 Dr. Claypool presented in his hours of testimony, and in
9 particular for the elements that Zynga has just cited.

10 THE COURT: What else, Counsel?

11 MR. HALL: We ask that you deny Zynga's
12 motion with regard to direct infringement.

13 THE COURT: Anything else?

14 MR. HALL: I believe Ms. Fair will handle
15 indirect infringement.

16 THE COURT: All right.

17 MS. FAIR: Your Honor, Andrea Fair for
18 PMC.

19 THE COURT: Proceed.

20 MS. FAIR: Mr. Zager challenged induced
21 infringement on the grounds that Zynga -- that PMC
22 hasn't proven the intent required for induced
23 infringement.

24 He challenged direct infringement, but
25 Dr. Hall just addressed how PMC has put on sufficient

1 evidence for a reasonable jury to conclude, taking all
2 of the evidence in the light most favorable to the
3 non-movant, that we have proven direct infringement.

4 And Mr. Zager conceded that Zynga took
5 action during the time that the patent was in force
6 intending to cause the acts by the other by the users
7 that infringe the patent.

8 He talked about how Mr. Carroll conceded
9 that they encouraged players to use their game. So what
10 really what we're talking about on induced infringement
11 is whether PMC has put forth sufficient evidence for a
12 reasonable jury to conclude that Zynga intended -- had
13 the knowledge that the acts taken by its users
14 constitute infringement.

15 Now, the Commil case from this summer out
16 of the Federal Circuit sets forth a willful blindness
17 standard. PMC doesn't have to prove that Zynga had an
18 objective belief that what its users were doing
19 constitute infringement.

20 PMC can prove that Zynga took deliberate
21 actions to avoid conforming a high probability that the
22 acts would constitute infringement. And the evidence
23 that PMC has put forth on that element is that
24 Dr. Claypool spent hundreds of hours working on his
25 report. He provided the 500 or 600-page report to

1 Zynga. He testified about that on the stand.

2 So Zynga had an indepth analysis of how
3 its games infringed. And Zynga did not put on any
4 evidence of a good-faith belief of invalidity, though
5 they had enablement still in the case at that point in
6 time.

7 They didn't put on any evidence of
8 analysis that was done by anybody at Zynga as to how the
9 games don't infringe or any good-faith belief of
10 non-infringement, and, in fact, their corporate
11 representative testified that he had not known about
12 this lawsuit until three months ago; that he didn't do
13 any claim-by-claim comparison; and he didn't have any
14 testimony to support a good-faith belief of
15 non-infringement or invalidity.

16 And so with Dr. Claypool's testimony,
17 paired together with no rebuttal evidence from Zynga of
18 a good-faith belief of non-infringement or invalidity,
19 that evidence is sufficient, taking all of it in the
20 light most favorable to the non-movant, PMC, to conclude
21 that Zynga took deliberate actions to avoid confirming a
22 high probability that the acts taken by its users
23 constitute infringement.

24 And we would ask that you deny Zynga's
25 motion for judgment as a matter of law on induced

1 infringement.

2 MR. RICE: Good morning, Your Honor. Jon
3 Rice responding on behalf of PMC on the contributory
4 infringement elements.

5 THE COURT: Proceed.

6 MR. RICE: All right. So the first thing
7 we have to show is that we've put forward evidence that
8 Zynga sells or offers to sell a component or apparatus.

9 And as Lucent found -- as the Court in
10 Lucent found, that that software can be that apparatus.
11 The software can be that product.

12 So then we needed to show that -- that
13 there was the -- there was the sale and the offer to
14 sell.

15 And what we have and what the evidence
16 shows is that -- is that -- like, for example, that
17 Plaintiff's Exhibit 455, the privacy policy, Bakewell's
18 testimony on Page 230 -- on Page 231 of the transcript,
19 Becker's testimony on Page 166 of the transcript.

20 We have testimony from Bakewell that
21 there are a hundred million monthly average users. We
22 have testimony from Dr. Becker that 1.5 million of those
23 users actually pay money.

24 And so whether the -- whether -- whether
25 people pay to actually buy Zynga's software is not

1 dispositive. And, in fact, the Maxim Integrated
2 Products case at 213 West Law 5777295 addressed that
3 exact point.

4 And what the Court there found in denying
5 the motion for summary judgment, which is the same
6 standard here, is that as long as there -- that the
7 evidence indicated that the user had to have some
8 relationship with the defendant in order to obtain the
9 free software.

10 And here, there's no dispute that Zynga's
11 customers have a relationship with Zynga. They have to
12 fill out that privacy policy.

13 And as Mr. Tomlinson testified -- I'm
14 sorry -- Mr. Tomlinson testified, when they filled that
15 out, Zynga then uses that, they collect that information
16 in order to analyze uses of our sites and services to
17 provide a more personalized experience and to manage
18 advertising.

19 The evidence shows that for purposes
20 of -- of the advertising revenue, they get a benefit,
21 Zynga gets a benefit from its users whether the users
22 buy anything from Zynga or not.

23 And then, of course, 1.5 million Zynga
24 customers actually spend money to buy things that are
25 used in the games and that the purchase of that --

1 that -- virtual products infringes the patents and that
2 the use of that virtual product infringes the patent.

3 So I think there is more than sufficient
4 evidence to show that the first element here, that the
5 offer to sell a component or apparatus that is used in
6 the process during the time of an asserted claim in
7 force has been met.

8 We also had testimony from Dr. Claypool
9 that the -- that the Zynga games have no substantial
10 non-infringing use. We put that slide up on the screen,
11 which I'm happy to show you, if you want to see it,
12 but -- but Dr. Claypool went through every single
13 element of that.

14 And he testified that there is no
15 substantial non-infringing use, that you can't play the
16 games without infringing.

17 Dr. Claypool testified that the patents
18 were foundational to Zynga's games.

19 Dr. Claypool testified about how the
20 apparatus constitutes a material part that -- that
21 Zynga's game constitutes a material part of the
22 invention disclosed in PMC's patents.

23 It's obvious that Zynga is -- in fact,
24 it's undisputed because Zynga admits from the stand that
25 they learned about the patents in February of 2012 and

1 that the product -- and that -- and that Dr. Claypool
2 has testified and that -- that the product or process
3 for which the component or apparatus has no -- has no
4 other substantial use may be covered by an asserted
5 claim.

6 Again, as Ms. Fair showed and as Dr. Hall
7 has showed, they had full knowledge of the game -- of
8 the -- of the -- of the patents, of our infringement
9 theories, of the -- of the -- of the evidence that we
10 thought showed the infringement, and they put -- they
11 did nothing in response to that.

12 The final step is that the use directly
13 infringes the asserted claims. And as Dr. -- as
14 Dr. Hall has showed, there is more than sufficient
15 evidence to show direct infringement by PMC in the
16 testing and that by -- and that for Claim 6, by PMC
17 operating Zynga's servers.

18 And so in short, I think there is more --
19 there is more than sufficient evidence for -- for a
20 reasonable jury to find in favor of PMC on the issue of
21 contributory infringement.

22 THE COURT: Looks like you're going to
23 have the whole trial team respond here mostly before
24 it's over, Mr. Zager.

25 Go ahead, Mr. Harrell.

1 MR. HARRELL: It takes a lot of us to
2 respond to Mr. Zager, Judge. Bob Harrell for PMC on
3 damages.

4 Mr. Zager raises three -- three principal
5 issues on damages.

6 First, running royalty, that there's no
7 evidence that in the damages model, we would be able to
8 use a running royalty. There is sufficient damages,
9 however -- or sufficient evidence of running royalty
10 through the Overture license agreement.

11 There's evidence in the record from
12 Mr. Claypool that the Overture license agreement is
13 comparable -- or that the Overture patents are
14 comparable to the Harvey patents.

15 So that comparability exists. In the
16 Overture license agreement, there is a running royalty.
17 So that provides sufficient evidence of the use of a
18 running royalty in this case.

19 Royalty rate, 2 percent. Mr. Zager says
20 you can imply royalty rates of .25 percent to -- to .5
21 percent in PMC's licenses.

22 First of all, we disagree with that,
23 because in those licenses, which are lump-sum licenses,
24 you don't know what the denominator is that is in the
25 accused products, and so you, therefore, can't imply a

1 royalty rate from them.

2 But even more so, the Overture license
3 agreement has a 4 percent -- or the three Overture
4 license agreements that Mr. Becker considered have a
5 royalty rate that he determined to be 4 percent. And so
6 from that 4 percent, he derived a rate of 2 percent to
7 apply in this case. So there's sufficient evidence of
8 that 2 percent rate.

9 Mr. Zager's third point is apportionment.
10 He says that Dr. Becker has not apportioned the royalty
11 base. We have two responses to that.

12 Number one is that the patents are
13 foundational. We got that evidence from Mr. Claypool.
14 That is unrebutted. If the patents are foundational,
15 there need be no apportionment.

16 Notwithstanding that, Dr. Becker did
17 apportion with respect to userpay revenue. He only
18 considered the users who actually are paying. He did
19 not consider the value that went to Zynga from the vast
20 majority of users who do not pay.

21 And -- and we know that there is value
22 from those users because that testimony came in through
23 Dorion Carroll and through Dr. Becker and through
24 Zynga's documents.

25 And -- excuse me -- with respect to

1 advertising revenue, he apportioned that as well. He
2 only used certain amounts of the advertising revenue.
3 The parts he didn't use, he could have used, because
4 those revenues would not have been generated to Zynga if
5 the games had -- had not been played. And because the
6 patents are foundational, you can't play the games
7 without the patents.

8 So I think I've hit all of the -- all of
9 the objections that Mr. Zager had. In sum, there's
10 legally sufficient evidence of the damages in this case,
11 Your Honor.

12 THE COURT: All right. Any other
13 response from the Plaintiff to the Defendant's motion?

14 MR. ZAGER: Response, Your Honor?

15 THE COURT: Briefly.

16 MR. ZAGER: Your Honor, I just want to
17 touch on a few things I heard some for the first time in
18 this case.

19 If we go to the issue of inducement and
20 whether the requisite intent exists, we now know that
21 this is a willful blindness case, because, frankly,
22 there is no evidence to the contrary. And what is the
23 only basis you heard for an allegation of willful
24 blindness?

25 It's, well, they got Dr. Claypool's

1 report and they could have read it in this case, and
2 after they read it, they continued to try to get people
3 to use their games.

4 The problem with that is that sounds nice
5 as we lawyers all talk about it, but that's not in the
6 record of evidence that this jury is going to see.
7 They're not going to see Dr. Claypool's report, and
8 they're not going to see Dr. Schaefer's report in
9 response to it. That's not part of the evidence in this
10 case.

11 So what they've articulated for you as
12 their basis for willful blindness is simply not part of
13 the record that you have before you upon which to base
14 your decision on our motion.

15 I would raise a second point. Now, that
16 we know that this is a willful blindness case, it speaks
17 to the issue of the admissibility of those IPRs that we
18 talked about earlier that were excluded. Because if the
19 allegation is post-suit you engaged in willful
20 blindness, you got an expert report and you were on
21 notice from the time that you got it, then certainly the
22 jury ought to be able to hear a response to that.

23 And we went to the Patent Office, and we
24 took advantage of the procedures there. And the Patent
25 Office agreed with us that there was a substantial

1 likelihood of invalidity. The IPRs are not before the
2 jury, and neither is Dr. Claypool's report, and the
3 requisite intent is just not there.

4 Turning to contributory infringement.
5 This is really dressed up as a second bite at the
6 inducement apple, because the elements of contributory
7 infringement are not present here. So what did we
8 learn?

9 Well, for the first time, we learned that
10 the product is allegedly our software. That's what
11 they've told you. And it is undisputed that we do not
12 sell our software. We just don't do it. And there's no
13 evidence in the record that we sell any product to
14 anyone.

15 This is just not a contributory
16 infringement case, and the sole reason to have it there
17 is so that the jury might get another bite at the apple,
18 if they were to decide no inducement.

19 Now, the running royalty is the last
20 issue I wanted to discuss with the Court. The evidence
21 that's missing in this case is the evidence to support a
22 running royalty in this case. It's not part of
23 Dr. Becker's analysis. He didn't get on the stand and
24 tell this jury, here's why you get a running royalty in
25 this case.

1 And the fact that the jury might hunt
2 through the Overture license and see that that contained
3 a running royalty doesn't meet the burden of proof that
4 PMC had here, which was to demonstrate by evidence
5 before this jury that a running royalty was appropriate
6 not in the Overture situation but in this situation.
7 And that's what's missing.

8 There is no testimony from any witness
9 about the propriety of a running royalty on the facts of
10 this case.

11 Thank you, Your Honor.

12 THE COURT: Short reply from the
13 Plaintiff? And then we've going to move on.

14 MS. FAIR: Yes, Your Honor.

15 I just want to briefly respond to
16 Mr. Zager's comments about Zynga's inability to put
17 forth its good-faith belief of invalidity.

18 Up until Monday night, Zynga still prior
19 art, anticipation, and obviousness as part of their
20 allegations in this case that they could have presented
21 to the jury to show their good-faith belief of
22 invalidity. They dropped that.

23 Up until yesterday, Zynga had its
24 allegations of enablement -- of an enablement ground of
25 invalidity in the case. They chose to drop that.

1 So they had ample opportunity to put before the jury
2 their good-faith belief of invalidity without getting
3 into their procedures that are before the Patent -- the
4 PTO.

5 Additionally, they had the opportunity to
6 do with their expert as Dr. Claypool did. Dr. Claypool
7 testified about how long his report was and how much
8 effort went into it.

9 Mr. Carroll did not say anything about
10 how Zynga had their expert, Dr. Schaefer, go through all
11 of this and they really believed that they weren't
12 infringing.

13 So we don't think that Zynga's motion for
14 judgment as a matter of law on induced infringement
15 should be granted.

16 THE COURT: All right.

17 MR. ZAGER: Your Honor, could I make a
18 statement to correct the record?

19 THE COURT: You may make one statement,
20 Mr. Zager.

21 MR. ZAGER: For the record, we did not
22 drop enablement. We decided not to call Dr. Fox, and
23 those are not the same things as you're going to hear, I
24 suspect, later this morning.

25 THE COURT: All right. With regard to

1 the Defendant's motion for judgment as a matter of law
2 regarding, among other things, the issues of direct
3 infringement, indirect infringement, contributory
4 infringement, induced infringement, damages
5 apportionment, and royalty rate, the Court finds that
6 that motion should and is denied.

7 This denial does not preclude the
8 Defendant from filing a supporting written motion as the
9 Court's indicated earlier. That motion should be filed
10 by or before 1:00 o'clock on Monday. And this ruling
11 does not in any way hinder or limit the Defendant from
12 reurging the same or similar motion for judgment as a
13 matter of law post-verdict under Rule 50(b).

14 But for purposes of Rule 50(a), the
15 motion is in all things denied.

16 Does Plaintiff have a motion under
17 Rule 50(a) to offer?

18 MR. HILL: We do, Your Honor.

19 I also have a quick question. Do you
20 want us to file any kind of response for purposes of the
21 record, or just have our response stand based on what's
22 been said before?

23 THE COURT: That is -- that is the
24 Plaintiff's call, Mr. Hill. If you choose to file a
25 response, you should also have it filed by Monday at

1 1:00 o'clock.

2 MR. HILL: Okay. Thank you, Your Honor.

3 THE COURT: I'll hear your motion.

4 MS. FAIR: Your Honor, we're moving for
5 judgment as a matter of law on three grounds. That is,
6 invalidity by anticipation, invalidity by obviousness,
7 and invalidity for lack of enablement.

8 Zynga has presented no evidence on any of
9 these three grounds of invalidity. And based on no
10 evidence can a reasonable jury conclude that the patents
11 are invalid, because they were participated, because
12 they were obvious, or because they fail for lack of
13 enablement.

14 On enablement, the only evidence that
15 they've tried to put forward is based on an incorrect
16 legal standard. They did not have an expert get up and
17 talk about the state of the art at the time of the
18 invention or talk about how a person having ordinary
19 skill in the art would have understood the claims in the
20 patents and been able -- or been unable to implement
21 them without undue experimentation.

22 And for those reasons, PMC moves for
23 judgment as a matter of law under Federal Rule of Civil
24 Procedure 50 on the grounds of anticipation,
25 obviousness, and lack of enablement.

1 MR. HARRELL: Your Honor -- Your Honor,
2 in addition, PMC moves for infringement as a matter of
3 law under both patents, '717 and '638, for purposes of
4 the record.

5 Thank you.

6 THE COURT: All right. Anything further
7 from the Plaintiff?

8 MR. HILL: No, Your Honor.

9 THE COURT: Response from the Defendant?
10

11 THE COURT: All right. Any other
12 response from the Plaintiff to the Defendant's motion?

13 MR. ZAGER: Response, Your Honor?

14 THE COURT: Briefly.

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5 not in the Overture situation but in this situation.
6 And that's what's missing.

7 There is no testimony from any witness
8 about the propriety of a running royalty on the facts of
9 this case.

10 Thank you, Your Honor.

11 THE COURT: Short reply from the
12 Plaintiff? And then we've going to move on.

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22 those are not the same things as you're going to hear, I
23 suspect, later this morning.

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25 the Defendant's motion for judgment as a matter of law

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16 Rule 50(a) to offer?

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19 want us to file any kind of response for purposes of the
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21 been said before?

22 THE COURT: That is -- that is the
23 Plaintiff's call, Mr. Hill. If you choose to file a
24 response, you should also have it filed by Monday at
25 1:00 o'clock.

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4 judgment as a matter of law on three grounds. That is,
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10 are invalid, because they were participated, because
11 they were obvious, or because they fail for lack of
12 enablement.

13 On enablement, the only evidence that
14 they've tried to put forward is based on an incorrect
15 legal standard. They did not have an expert get up and
16 talk about the state of the art at the time of the
17 invention or talk about how a person having ordinary
18 skill in the art would have understood the claims in the
19 patents and been able -- or been unable to implement
20 them without undue experimentation.

21 And for those reasons, PMC moves for
22 judgment as a matter of law under Federal Rule of Civil
23 Procedure 50 on the grounds of anticipation,
24 obviousness, and lack of enablement.

25 MR. HARRELL: Your Honor -- Your Honor,

1 in addition, PMC moves for infringement as a matter of
2 law under both patents, '717 and '638, for purposes of
3 the record.

4 Thank you.

5 THE COURT: All right. Anything further
6 from the Plaintiff?

7 MR. HILL: No, Your Honor.

8 THE COURT: Response from the Defendant?

9 MR. ZAGER: I'll briefly mention
10 invalidity by anticipation and obviousness, patent
11 infringement as a matter of law. The real meat I want
12 to talk about is enablement.

13 As the Court is well aware, we never
14 presented the anticipation and obviousness defenses in
15 this case, and made a decision not to do that before we
16 even started the trial.

17 As to the infringement as a matter of
18 law, I think all of those arguments have been addressed
19 in response to our motion for judgment as a matter of
20 law on the various infringement theories. And the Court
21 has already heard a recitation of the evidence there. I
22 won't do it again.

23 But I think enablement is very, very
24 important, and I want to spend some time on that.

25 Now, as the Court is well aware, we

1 decided not to call an expert witness on enablement.
2 And where is it written that you must call an expert
3 witness to prove enablement?

4 It's not. In fact, if you'll look at the
5 citations on your screen, Your Honor, it's pretty clear
6 that you can prove invalidity without expert opinion
7 under appropriate circumstances. So what I want to talk
8 about is the evidence in this case.

9 What does PMC say that Mr. Harvey
10 invented?

11 Well, they say he invented, in their
12 opening, an interactive media experience that's both
13 personalized and shared.

14 Can you pull all that down, please,
15 Mr. Lodge?

16 That's both personalized and shared using
17 local and remote computers and mobile devices. That's a
18 quote from PMC from their opening statement, Trial
19 Record 52, 8 through 13.

20 So the issue is, as the Court well knows,
21 would a person skilled in the art, upon reading the
22 patent document, be able to make that invention without
23 undue experimentation?

24 Now, if we take a look at the jury
25 instruction proposed by PMC, not Zynga in this case, on

1 the issue of enablement, we see the elements there that
2 PMC believes the Court should consider with respect to
3 the issue of what amounts to undue experimentation.

4 And those elements are barred from some
5 of the Federal Circuit case law: The quantity of
6 experimentation necessary, the amount of direction or
7 guidance disclosed in the patent, the presence or
8 absence of working examples in the patent, the nature of
9 the invention, the state of the prior art, the relative
10 skill of those in the art, the predictability of the
11 art, and the breadth of the claims.

12 Now, what do we know?

13 We know that the Zynga patents share the
14 same specification.

15 And what is the evidence about that
16 specification?

17 Well, Mr. Harvey, in the trial record,
18 testified that he wrote the specification.

19 If we could find the right slide, please,
20 Mr. Lodge.

21 No.

22 No.

23 No.

24 No.

25 No.

1 THE TECHNICIAN: We don't have it.

2 MR. ZAGER: All right. I can recite the
3 record citation, and I don't think it's in dispute, but
4 Mr. Harvey testified, at Trial Record 143, 20 through
5 23: I wrote the specification.

6 He also testified in the trial record at
7 116, 13 through 22, that he was not one skilled in the
8 art. So we have an admission by the inventor, I'm not
9 one skilled in the art; I wrote the specification; and
10 I'm writing for an audience that is skilled in the art.

11 Now, the specification in this patent
12 uses the word information thousands of times.

13 If I might approach, Your Honor, I've
14 highlighted the use of the word information in the
15 patent specification so that the Court might get some
16 idea how many times that word appears.

17 THE COURT: You may approach.

18 MR. ZAGER: And that's from Plaintiff's
19 Exhibit 1, the specification of the '717 patent. And as
20 I've indicated for the record, we performed the
21 highlighting so that the Court could see that
22 information, the word, appears literally a hundred times
23 on every page of the specification.

24 Why is that important?

25 Because Mr. Harvey testified that the

1 word information in patents is a word so vague that it
2 could mean virtually anything, at 147, Lines 3 through 7
3 of the trial record.

4 Now, if the specification is supposed to
5 enable the claims, supposed to teach one skilled in the
6 art how to do that, and we have unrebutted evidence from
7 the guy who wrote it saying that the word information is
8 so vague that it could mean almost anything, could the
9 jury conclude that the specification could not possibly
10 teach one skilled in the art how to enable the claims?

11 You bet you. And the interesting thing
12 about that evidence is that it's completely unrebutted
13 in this case.

14 There is other evidence that I'd like to
15 talk to you about, about lack of enablement. Mr. Harvey
16 testified that there was no operational prototype, at
17 142, Lines 12 through 14 of the trial record.

18 He also testified that PMC only built one
19 and never attempted to build another, at 141, 15 through
20 20 of the trial record.

21 Federal Circuit law says a failed attempt
22 at commercialization is strong evidence of a lack of
23 enablement. The Ormco Corporation versus Align
24 Technologies case from the Federal Circuit in 2007.

25 We also have PMC's admission a few years

1 after the date of invention that the skills, knowledge,
2 and infrastructure for implementation are not presently
3 available. And that comes from Defendant's Exhibit 47,
4 the -- the PMC business plan and the -- the Harvey
5 testimony, at 148, Lines 4 through 10 of the trial
6 record.

7 If the skills, knowledge, and
8 infrastructure to implement PMC's invention were not
9 available in the 1990s, they surely were not available
10 in 1987. And, again, this is an admission by
11 Mr. Harvey, the fellow who wrote the specification. And
12 the evidence is clear and convincing, because it was
13 never rebutted by anyone in this trial.

14 Delay in technological development long
15 after the date of the invention is also more evidence of
16 lack of enablement. And that's the Federal Circuit in
17 the Plant Genetic Systems case, 315 F.3d 1335, in 2003.

18 The unproven nature of technology is also
19 evidence of lack of enablement. Mr. Harvey testified
20 that PMC never made a product, at Page 108, Lines 18
21 through 24 of the trial record.

22 Now, PMC admits that they are now trying
23 to read these patents to apply to computers
24 communicating over the Internet and mobile devices. So
25 then the special -- the specification must enable this

1 technology for the purpose of the claims. And that's
2 the essence of full-scope enablement.

3 What did Mr. Cuddihy say? He was the
4 co-inventor.

5 When he testified, he said that they knew
6 about what he called the embryonic Internet back when
7 Mr. Harvey wrote the specifications. And that's
8 important, because under Federal Circuit law, Nascent
9 Technologies such as that needs to be enabled with a
10 specific useful teaching.

11 So you have Mr. Cuddihy, the co-inventor,
12 say we knew about the Nascent Internet, and you have Mr.
13 Harvey admit that the word Internet appears nowhere in
14 the specification. The Chiron case from the Federal
15 Circuit in 2004 -- if we can go back a slide, please,
16 Mr. Lodge -- says Nascent Technology, however, must be
17 enabled with a specific and useful teaching. The law
18 requires an enabling disclosure for Nascent Technology.
19 Clear and convincing evidence, it is unrebutted.

20 Now, we know that the Internet was not
21 commercially available until 1992. That evidence is
22 unrebutted.

23 And Mr. Cuddihy also testified that they
24 knew about cell phones back when Mr. Harvey wrote the
25 specification, but he makes no mention of them in the

1 specification, again looking at the Chiron case. And we
2 know that digital phones were not available until 1992.

3 What does all of this mean? All of this
4 means that it's pretty clear and convincing that the way
5 they're trying to read these patents was not enabled in
6 the specification, and that means you go to the issue of
7 undue experimentation.

8 And those are those eight factors that
9 PMC set out in its own proffer for a jury instruction.

10 And I know the Court is reluctant to
11 consider evidence of subsequent technological
12 developments. The Court's made that clear. But when it
13 comes to the issue of undue experimentation and the
14 eight elements that PMC agrees you should consider,
15 that's where some evidence of subsequent technological
16 development comes into play.

17 When you consider the quantity of
18 experimentation necessary to get there, you can look at
19 subsequent technological developments, not for the truth
20 of what happened in 1992, but for the fact that that did
21 not exist in 1987. And that, too, is established
22 Federal Circuit law.

23 And so consequently, you may take those
24 technological developments and use them to look backward
25 to the date of the invention to look at what was not

1 known at that time.

2 And that certainly informs the quantity
3 of experimentation necessary to come to some conclusion
4 about whether there was enablement without undue
5 experimentation.

6 Now, let me give you some examples. The
7 quantity of experimentation necessary where it is
8 undisputed that the computer languages would not be
9 available for another decade, no rebuttal to that. But
10 that certainly informs the quantity of experimentation
11 necessary for one skilled in the art back in 1987 to get
12 there.

13 Digital phones not existing for several
14 more years in a digital network informs the quantity of
15 experimentation necessary back in 1987.

16 The amount and direction of guidance
17 disclosed in the patent -- that's the second element --
18 there is none. Undisputed. No mention of the Internet;
19 no mention of mobile phones.

20 The only examples we heard in this Court
21 were actually drawn up by we know not who, and
22 Mr. Harvey had to admit on cross-examination that the
23 diagram with all the circles and the Weather Channel
24 diagram with all the circles, he didn't know who created
25 them. And those things certainly were not in the

1 specification.

2 The -- the presence or absence of working
3 examples. Working examples would not have been possible
4 as of the date of the invention in 1987. And how do we
5 know that? We have an admission by a party opponent in
6 a business plan that says the skills, knowledge, and
7 infrastructure for implementation of personalized mass
8 media weren't available in 1987.

9 The nature of the invention, one of the
10 other factors to be considered, what did Mr. Harvey say
11 about that himself? He said: It's not something which
12 over time has been easy to use.

13 The breadth of the claims. Well,
14 Mr. Cuddihy testified before the jury that they never
15 believed the claims were limited only to TV.

16 Dr. Claypool testified that the claims
17 cover the Internet, according to PMC, even though the
18 Internet did not exist at the time.

19 He testified that the claims cover mobile
20 device technology, according to PMC, even though mobile
21 device technology did not exist at the time.

22 And PMC has touted the expandability and
23 flexibility of these patents throughout the trial. In
24 fact, according to PMC, the claims cover programming
25 languages that did not yet exist when the invention was

1 made, programming languages that are not mentioned in
2 the specification, including HTML, XML, Adobe Flash, and
3 JavaScript.

4 Again, all of those things inform the
5 nature of the experimentation necessary. Not to suggest
6 that we're going to talk about the 1990s. We're not.
7 But by virtue of the fact that they did not come into
8 existence until the 1980s, they inform the state of the
9 art at the time of the invention in 1987.

10 Finally, there's the issue of the quantum
11 of proof. Clear and convincing evidence. It's true
12 that we don't have an expert opinion. I concede that.
13 It's also true we don't need one.

14 Does this rise to the level of clear and
15 convincing evidence? We certainly think it does. And
16 why? Because none of what I told you in the last few
17 minutes is rebutted in any place in this trial record.

18 So you have admissions by a party
19 opponent that prove that the specification is ambiguous,
20 which would show that one skilled in the art would have
21 difficulty since the word information is vague and
22 ambiguous and appears thousands of times in the spec,
23 and then you turn to the issue of undue experimentation
24 and the evidence that informs that.

25 Your Honor, I believe we've made a pretty

1 good enablement case here. And we don't think that case
2 should be decided against us as a matter of law.

3 At the very least, this Court should let
4 the jury decide that issue. And if the Court, based
5 upon its reflection, has qualms about it, then a JMOV
6 might be the right road to go down, but we think we've
7 made a pretty solid enablement case, and we believe the
8 record supports it.

9 THE COURT: Plaintiff have a response to
10 the motion?

11 MS. FAIR: Yes, Your Honor.

12 Your Honor, Mr. Zager said he thinks they
13 have a pretty good enablement case. Pretty good isn't
14 clear and convincing evidence.

15 Clear and convincing requires that the
16 jury have an abiding conviction of the truth of the
17 party's factual contentions because they are highly
18 probable.

19 And the reason the jury can't have an
20 abiding conviction that the claimed invention in this
21 case is not enabled is because the arguments
22 that Mr. Zager just presented about enablement are
23 legally flawed.

24 Enablement is a claims analysis. It's an
25 analysis of looking at the claim language and the

1 specification.

2 And it is critical to have an expert look
3 at the claims, look at the specification, and say, a
4 person having ordinary skill in the art would read the
5 claims and would read the specification and would either
6 know or not know how to implement the claimed invention
7 without undue experimentation at the time of the
8 invention.

9 And Mr. Zager spent a long time talking
10 about the Internet and cell phones and HTML and XML and
11 all of the technologies that Zynga uses to embody the
12 claimed invention. That's not what the law requires for
13 enablement.

14 Johns Hopkins case from 1988 in the
15 Federal Circuit said that you only have to enable one
16 embodiment of the claim. You only have to enable one
17 embodiment of the invention to meet the enablement
18 requirement.

19 Full scope enablement that Mr. Zager's
20 talking about is not the law. Full scope enablement
21 requires looking at the claims and the Court's
22 construction of that language, as this Court has ordered
23 in striking Dr. Fox's second supplemental report.

24 There is no evidence in this case of
25 which claim of the patents at issue in this case are

1 not -- is not enabled. No expert has taken the stand
2 and read a claim and said this couldn't have been
3 practiced in 1987.

4 And, in fact, Mr. Harvey got up -- got up
5 and talked about the prototype that PMC put together
6 with outdated technology even at the time that embodied
7 the -- the inventions. He testified that the prototype
8 worked.

9 Mr. Zager talks about a 1991 business
10 plan that talks about how there are more technologies
11 that could use the invention. The line that Mr. Zager
12 has taken out of that document is out of context, and
13 one line in a document is not enough to meet the clear
14 and convincing burden for lack of enablement.

15 In short, Your Honor, we're hearing the
16 same thing that we heard from Dr. Fox's second
17 supplemental report, and that is that Zynga is trying to
18 prove lack of enablement on a flawed legal standard.

19 There's no evidence of anybody looking at
20 the claims in this case, comparing them to the
21 specification, and proving that -- by clear and
22 convincing evidence that a person having ordinary skill
23 in the art would not be able to practice the claimed
24 invention in 1987 without undue experimentation.

25 All of the factors for undue

1 experimentation that Mr. Zager laid up here on the
2 screen, nobody's gotten up and talked about how those
3 factors play into the claimed invention.

4 And so in short, although Mr. Zager's
5 argument may have been persuasive about how the Internet
6 wasn't around in 1987, it's irrelevant to enablement,
7 and it's not in evidence.

8 MR. ZAGER: Short response, Your Honor?

9 THE COURT: Very short.

10 MR. ZAGER: Your Honor, this is not
11 Dr. Fox's report. Dr. Fox's report that was stricken
12 was, are the games enabled. This is an enablement
13 analysis based upon the definition of what the invention
14 is, as offered by the Plaintiff in opening statement.

15 But here's the thing: If Mr. Harvey had
16 stood on the -- sat down on the stand and said,
17 Mr. Zager, I admit my specification I wrote does not
18 enable the claims, would this Court have any trouble
19 letting that go to the jury?

20 Well, the fact he didn't come right out
21 and say that, but he said some other things that come
22 awfully close, that ought to go to the jury, too.
23 And the standard of clear and convincing evidence -- I
24 think the reason they're afraid to let this go to the
25 jury is that they suspect the jury will believe me when

1 I point out how many times information appears in that
2 specification, and an admission from the guy who wrote
3 it, that that word is virtually meaningless.

4 I think we have plenty of evidence in
5 this record, none of it responded to, that goes to
6 enablement, and it's for me, on closing argument, to tie
7 that all together, but the evidence itself is there.
8 And the evidence is part of this record. We think we
9 deserve to have the jury hear enablement.

10 THE COURT: All right. With regard to
11 the Defendant's -- excuse me -- the Plaintiff's motion
12 for judgment as a matter of law under Rule 50(a), the
13 Court, as it did with the Defendant's motion, permits
14 the Plaintiff to file any supporting written version of
15 their motion that they choose to before 1:00 o'clock on
16 Monday, and likewise permits the Defendant to file any
17 written response that they choose to by 1:00 o'clock on
18 Monday.

19 With regard to the Plaintiff's motion,
20 the Court denies the motion for judgment as a matter of
21 law as to the issue of infringement.

22 As to the issues -- or as to the issue of
23 invalidity based upon anticipation, obviousness, or lack
24 of enablement, the Court finds that a reasonable jury
25 would not have a legally sufficient evidentiary basis to

1 find for the Defendant on any of those issues.

2 The Court finds the Defendant has failed
3 to meet its clear and convincing evidence burden of
4 proof on each of those three theories of invalidity,
5 and, therefore, the Court grants the Plaintiff's motion
6 for judgment as a matter of law as to invalidity based
7 upon anticipation, obviousness, or lack of enablement.

8 All right, Counsel. I assume those are
9 all the motions from the parties as to Rule 50(a). I
10 plan next to meet with those of your respective trial
11 teams that are charged with working on the final jury
12 instructions and verdict form in chambers for an
13 informal charge conference, and I'll do that in
14 15 minutes at 9:30.

15 Until then, we stand in recess.

16 COURT SECURITY OFFICER: All rise.

17 (Recess.)

18 (Jury out.)

19 COURT SECURITY OFFICER: All rise.

20 THE COURT: Be seated, please.

21 All right. I understand, Mr. Zager, you
22 have a motion to offer on behalf of the Defendant?

23 MR. ZAGER: I do, Your Honor.

24 THE COURT: The Court will hear from you
25 at this time.

1 MR. ZAGER: Thank you, Your Honor. Steve
2 Zager for Zynga.

3 May it please the Court.

4 The Court has granted now the Plaintiff's
5 motion for judgment as a matter of law on all of the
6 invalidity claims in the case. When we rested, that was
7 not the state of the case.

8 As a result, we move to reopen the
9 evidence solely for the purpose now of introducing
10 before the jury the IPRs that were previously excluded
11 on the basis of the prejudice that would result to PMC
12 in connection with our invalidity defenses, if they were
13 admitted, for all of the same reasons that we've already
14 talked to the Court about as to why we believe they're
15 relevant.

16 Thank you, Your Honor.

17 THE COURT: Is there a response from the
18 Plaintiff?

19 MR. HILL: Your Honor, I will be very
20 brief.

21 From the Plaintiff's perspective, the
22 Court made the correct ruling originally now that we've
23 seen what the level of prejudice, the basis on which the
24 Court excluded the IPRs, have remained the same.

25 The probative value of those proceedings

1 has now decreased markedly considering that there is
2 no -- there was no invalidity evidence presented to the
3 jury. So to present, in contrast now to the IPR, under
4 that circumstance, they would be even less probative,
5 but the prejudicial effect remains the same.

6 So we think the 403 balance even tips
7 even more in our favor.

8 MR. ZAGER: Short response, Your Honor?

9 THE COURT: Very short.

10 MR. ZAGER: Your Honor, the purpose of
11 the IPR is to prove our good-faith belief in invalidity
12 as a defense to inducement under the Commil case.

13 And so that was the purpose of the IPRs,
14 and they remain probative of that because the inducement
15 is still in the case. And that's our defense, that we
16 had no intent, and so consequently, they're just as
17 probative as they ever were.

18 THE COURT: Well, the Court denies the
19 Defendant's motion. The Court believes that under a
20 403-type analysis, that the potential for prejudice by
21 the admission or use of these IPRs would far outweigh
22 any probative value.

23 The Court further believes that the
24 prejudice is not limited to any particular or isolated
25 portion of the case but would be prejudicial to the case

1 as a whole.

2 And, therefore, notwithstanding the
3 Court's grant of a portion of the Plaintiff's motion for
4 judgment as a matter of law, still believes that the
5 remaining prejudice -- prejudicial effect supports the
6 Court's ruling. So the motion's denied.

7 I also understand the Defendant's desire,
8 for purposes of preserving their record, to make a
9 written proffer of evidence. I'll hear from the
10 Defendants in that regard.

11 MR. WILLIAMS: Your Honor, Fred Williams
12 for Zynga.

13 If I may approach, I've got -- I've got
14 three of these written proffers.

15 THE COURT: All right. You may approach.

16 MR. WILLIAMS: Your Honor, I've handed
17 the Court three proffers.

18 The first is Zynga's proffer on
19 excluded -- excluded inter partes review evidence.

20 And then the second is tender of a
21 limiting jury instruction related to the inter partes
22 review evidence.

23 The third is Zynga's proffer of excluded
24 testimony of David Crane.

25 And I understand that PMC does not object

1 to those.

2 We also have a fourth that we have
3 prepared for Dr. Fox and confirm with counsel with
4 PMC -- they've asked us to remove some of that
5 information. With the Court's permission, we'd like to
6 be able to file that in a little bit today after we can
7 get all of the details worked out with the Plaintiff.

8 THE COURT: All right. What else do you
9 have for me on this?

10 MR. WILLIAMS: That's all, Your Honor.

11 THE COURT: Is there objection to the
12 proffer from the Plaintiff?

13 MR. HARRELL: No objection, except for
14 Dr. Fox's, which we'll probably work out.

15 THE COURT: Well, I'll assume that if
16 there are not disputes with regard to Dr. Fox's proffer,
17 that it will be submitted by agreement. If I hear
18 otherwise, then I'll take those up if and when they
19 present themselves.

20 But that notwithstanding, the proffer as
21 tendered and is accepted by the Court for purposes of
22 the record.

23 MR. WILLIAMS: Thank you, Your Honor.

24 THE COURT: All right. We'll next move
25 to the formal charge conference.

1 Earlier today, the Court met with counsel
2 in chambers and conducted an informal charge conference.
3 That was based upon the Court's revision of the parties'
4 joint submission of a proposed final jury instruction
5 and verdict form.

6 The Court's revision was furnished to the
7 parties yesterday evening, and with an opportunity to
8 have reviewed and adjusted the same, the Court met
9 earlier today with the parties, informally listened to
10 their comments and suggestions, both as to what the
11 Court had furnished and to any additional provisions
12 that they wish to be included that were not set forth
13 therein.

14 The Court's taken those comments and
15 proposals into consideration and has generated a revised
16 final jury instruction and verdict form, which the
17 parties have received and had an opportunity to review,
18 and it's now the Court's intent, for purposes of the
19 record, to hear from those parties -- hear from the
20 parties and take up any remaining objections that either
21 party would wish to make as to the final instructions to
22 the jury and the verdict form.

23 So with that, the Court first turns
24 attention to the current version of the final jury
25 instructions that was generated post the informal charge

1 conference and delivered earlier today to the parties.

2 And turning to Page 1, I'll ask if there
3 are any objections from either party. And my intent,
4 Counsel, is to go through this on a page-by-page basis.

5 Counsel who are charged or tasked with
6 responding for your respective sides may simply want to
7 stand at the podium, so if there's a place where you
8 have a comment or objection to make, you'll be there,
9 and we won't waste time walking back and forth and back
10 and forth.

11 So if those respective counsel want to go
12 to the podium at this time, we'll start with a review of
13 the final jury instructions.

14 Are there objections from either
15 Plaintiff or Defendant as to the contents of Page 1 of
16 the final jury instructions?

17 MS. FAIR: None by Plaintiff, Your Honor.

18 MR. MOFFETT: Daniel Moffett on behalf of
19 Zynga.

20 No objections.

21 THE COURT: All right. Page 2 of the
22 jury instruction.

23 MS. FAIR: Your Honor, Andrea Fair for
24 Plaintiff.

25 None for Plaintiff on Page 2.

1 MR. MOFFETT: No objection from
2 Defendant.

3 THE COURT: Page 3.

4 MS. FAIR: No objection from Plaintiff.

5 MR. MOFFETT: No objection from
6 Defendant.

7 THE COURT: Page 4.

8 MS. FAIR: No objection from Plaintiff.

9 MR. MOFFETT: No objection.

10 THE COURT: Page 5.

11 MS. FAIR: No objection.

12 MR. MOFFETT: No objection.

13 THE COURT: Page 6.

14 MS. FAIR: No objection.

15 MR. MOFFETT: No objection.

16 THE COURT: Page 7.

17 MS. FAIR: Your Honor, Plaintiff objects
18 at the bottom of Page 7 on the numbered Paragraphs 1, 2,
19 and 3, where it reads: An apparatus, the apparatus, and
20 the apparatus.

21 Plaintiff proposes that it reads a
22 material or apparatus, a material or apparatus, and
23 material or apparatus.

24 THE COURT: All right.

25 MS. FAIR: No other objections on Page 7.

1 THE COURT: Plaintiff's objection as
2 noted on Page 7 is overruled.

3 Is there objection from the Defendant as
4 to anything on Page 7?

5 MR. MOFFETT: No objection on 7, Your
6 Honor.

7 THE COURT: Next then, turning to Page 8,
8 are there objections from either party as to the
9 contents of Page 8?

10 MS. FAIR: Your Honor, at the top of Page
11 8, No. 4, Plaintiff proposes that it reads: Zynga is
12 aware of the patent containing the asserted claim and
13 knows that the product or process for which the
14 component or material or apparatus has no other
15 substantial use may be covered by an asserted claim.
16 And then lower, on Page 8, the paragraph numbered 3 that
17 begins Zynga was aware, after the or, Plaintiff proposes
18 that it read: Zynga took deliberate actions to avoid
19 confirming a high probability that the acts, if taken,
20 would constitute infringement of the patent.

21 And then the last line of Page 8 where it
22 begins Zynga believed, Plaintiff proposes that it read:
23 Zynga took deliberate actions to avoid confirming the
24 high probability that the acts, if taken, would
25 constitute infringement of the patent.

1 And then that would strike all the way
2 through the top of Page 9 and begin to pick up again, in
3 order to find inducement of infringement.

4 So we object to the charge as written and
5 propose the instruction as I just read it.

6 THE COURT: All right. Those objections
7 as to Page 8 carrying over to the top of Page 9 from
8 the -- from the Plaintiff are overruled.

9 Are there objections on Page 8 from the
10 Defendant?

11 MR. MOFFETT: Yes, Your Honor.
12 Defendant objects to two portions, a portion on Page 8
13 and another section going from Page 8 to Page 9.
14 In particular, Zynga objects to language on -- under
15 point 3 on Page 8 beginning: Or Zynga believed there
16 was a high probability that the acts, if taken, would
17 constitute infringement of the patent, but deliberately
18 avoided confirming that belief because this goes to
19 blindness, which we contend there's no evidence of.

20 Similarly, Zynga objects to the phrase
21 beginning on the second to last line of Page 8, reading:
22 Or that Zynga believed there was a high probability that
23 the other party or parties would infringe the patent,
24 but remained willfully blind to the infringing nature of
25 the other parties' acts.

1 And we ask -- we object to both of those
2 and we ask that they be stricken.

3 THE COURT: All right. Defendant's
4 objections as lodged with regard to the contents of
5 Page 8 and carrying over to the top of Page 9 are also
6 overruled.

7 Are there additional objections from
8 either party as to the remainder of Page 9?

9 MS. FAIR: None from Plaintiff, Your
10 Honor.

11 MR. MOFFETT: Yes, Your Honor.

12 Defendant objects to the exclusion of an
13 instruction from the DSU Medical case, and we ask that
14 the following be added after the first partial paragraph
15 on Page 9, and that is the following: Merely intending
16 to cause the acts that produce direct infringement is
17 not sufficient to establish induced infringement.

18 THE COURT: All right. That objection
19 and proposed addition is overruled.

20 MR. MOFFETT: And -- and, Your Honor,
21 we -- we all have additional objection on Page 9, prior
22 to the discussion of damages, which begins at the last
23 partial paragraph on Page 9. Zynga objects to the
24 exclusion of an instruction on invalidity and Zynga
25 requests that the following be added to the

1 instructions:

2 Zynga claims that PMC's patents are not
3 valid. A patent issued by the United States Patent
4 Office is presumed to be valid. In order to rebut this
5 presumption, Zynga must establish by clear and
6 convincing evidence that the asserted claims are not
7 valid.

8 Zynga contends that the asserted claims
9 are invalid as the specifications in the patents do not
10 meet the enablement requirement of the patent statute,
11 which I'll explain in more detail.

12 If you find by clear and convincing
13 evidence that a claim fails to meet the enablement
14 requirement, you should find that the claim is invalid
15 and render a verdict for Zynga on the claim.

16 Enablement. Zynga contends that the
17 asserted claims are invalid, because the patent does not
18 disclose sufficient information to enable one skilled in
19 the field of the invention at the time the application
20 was filed or its effective filing date to make and use
21 the claimed invention.

22 This requirement is known as the
23 enablement requirement. If the patent claim is not
24 enabled, it is invalid. Each claim must be analyzed in
25 compliance with the enablement requirement. Zynga must

1 prove by clear and convincing evidence that the claim
2 was not enabled.

3 In considering whether a patent claim
4 satisfies the enablement requirement, you must keep in
5 mind that the patents are written for persons skilled in
6 the field of the invention as the patent need not
7 expressly state information that skilled persons would
8 be likely to know or could obtain.

9 Zynga bears the burden of establishing
10 lack of enablement by showing by clear and convincing
11 evidence that a person skilled in the art, upon reading
12 the patent document, would not be able to make the
13 invention work without undue experimentation.

14 The fact that some experimentation may be
15 required for a skilled person to make or use the claimed
16 invention does not mean that a patent's written
17 description fails to meet the enablement requirement.

18 The fact you may consider in determining
19 whether making the invention would require undue
20 experimentation include the quantity of experimentation
21 necessary, the amount of direction or guidance disclosed
22 in the patent, the presence or absence of working
23 examples in the patent, the nature of the invention, the
24 state of the prior art, the relative skill of those in
25 the art, predictability of the art, and the breadth of

1 the claims.

2 If you find that one or more of these
3 claims do not comply with the enablement requirement,
4 you must find each such claim invalid.

5 THE COURT: All right. That objection
6 and request for additional inclusion in the charge is
7 overruled and denied by the Court.

8 Moving to Page 10, is there any objection
9 from either party as to the contents of Page 10 in the
10 proposed final jury instruction?

11 MS. FAIR: None for Plaintiff.

12 MR. MOFFETT: No objection from the
13 Defendant.

14 THE COURT: Is there objection as to Page
15 11?

16 MS. FAIR: None from Plaintiff.

17 MR. MOFFETT: No objection from
18 Defendant.

19 THE COURT: Is there objection as to the
20 contents of Page 12?

21 MS. FAIR: None from Plaintiff.

22 MR. MOFFETT: No objection.

23 THE COURT: Page 13.

24 MS. FAIR: None from Plaintiff.

25 MR. MOFFETT: No objection.

1 THE COURT: And the final page of the
2 proposed jury instructions, Page 14.

3 MS. FAIR: None from Plaintiff.

4 MR. MOFFETT: No objection.

5 THE COURT: Okay. Those matters being
6 raised and overruled by the Court, the final jury
7 instructions, as you have them before you, are the
8 instructions the Court will give to the jury beginning
9 at 1:00 o'clock on Monday afternoon.

10 I'll next turn your attention to the
11 proposed verdict form containing five pages, and I'll
12 ask if either party has objections they wish to make for
13 the record as to the proposed verdict form.

14 Starting with Page 1, is there any
15 objection?

16 MS. FAIR: None for Plaintiff.

17 MR. MOFFETT: And no objection to Page 1,
18 Your Honor.

19 THE COURT: Page 2.

20 MS. FAIR: None for Plaintiff.

21 MR. MOFFETT: Your Honor, Zynga objects
22 to the exclusion of the particular question on Page 2.
23 Before Question No. 2, Zynga proposes the following
24 question: Do you find that Zynga knew of the PMC
25 patents that Zynga sells or offers an apparatus for the

1 use and the process covered by a PMC patent and that
2 Zynga knew that the process for which the provided
3 apparatus was especially designed would infringe one or
4 more claims of a PMC patent?

5 Answer: Yes or no.

6 THE COURT: All right. That proposed
7 addition by the Defendant is overruled.

8 Are there any other objections as to Page
9 2 from the Defendant?

10 MR. MOFFETT: No, Your Honor.

11 THE COURT: And turning to Page 3, are
12 there any objections from either party as to the
13 contents of Page 3 of the verdict form?

14 MS. FAIR: None for Plaintiff.

15 MR. MOFFETT: Your Honor, yes, Defendant
16 has an objection. We request the additional question
17 prior to Question No. 3 --

18 THE COURT: And, Counsel, if you would
19 slow down for the court reporter's benefit. I don't
20 mind you reading it word for word, but slow down just a
21 little bit.

22 MR. MOFFETT: I apologize, Your Honor.

23 THE COURT: Go ahead.

24 MR. MOFFETT: The additional question
25 will be as follows: Do you find that Zynga knew of the

1 PMC patents, aided, instructed, or otherwise intended to
2 cause players of its accused games to directly infringe
3 PMC patents and that Zynga knew that its actions would
4 result in direct infringement?

5 Answer: Yes or no.

6 THE COURT: All right. That proposed
7 addition and change to Page 3 of the verdict form is
8 overruled.

9 Are there any objections from either
10 party as to the contents of Page 4 of the verdict form?

11 MS. FAIR: None for Plaintiff.

12 MR. MOFFETT: Yes, Your Honor.
13 Defendant objects to the exclusion of a question on
14 invalidity. Defendant proposes the following question:
15 Do you find that Zynga has proven by clear and
16 convincing evidence that any of the following claims are
17 invalid for not being enabled to the full scope of the
18 claim?

19 Answer: Yes or no for each claim.

20 Claim 1 of U.S. Patent 7,797,717.

21 Claim 4 of U.S. Patent 7,797,717.

22 Claim 7 of U.S. Patent 7,797,717.

23 Claim 1 of U.S. Patent 7,908,638.

24 Claim 3 of U.S. Patent 7,908,638.

25 Claim 6 of U.S. Patent 7,908,638.

1 THE COURT: All right. The objection of
2 the Defendant's, including their requested additional
3 insertion on Page 4 of the verdict form, is overruled.
4 Is there objection from either party as to Page 5 of the
5 verdict?

6 MS. FAIR: None, Your Honor.

7 MR. MOFFETT: No objection from the
8 Defendant.

9 THE COURT: All right. Then the verdict
10 form before you, counsel, is the one that the Court will
11 submit to the jury when they are instructed to retire
12 and deliberate, the various objections being raised as a
13 part of this formal charge conference with regard to the
14 verdict form having been expressly overruled by the
15 Court.

16 Thank you, Counsel. You may have a seat.

17 That completes the formal charge
18 conference both as to the Court's final instructions to
19 the jury and the verdict form.

20 For the record, during an earlier
21 conference with counsel for both sides that was not on
22 the record, the Court understands that the Defendant's
23 earlier agreement to not exchange slides to be used in
24 closing argument has been withdrawn, and therefore, the
25 Court withdraws its previously granted permission to

1 avoid and not engage in express exchange of those slides
2 prior to final jury argument, and the Court directs the
3 parties to exchange with each other their proposed
4 slides for use in final jury argument by 9:00 o'clock on
5 Monday morning.

6 And if there are disputes, the Court will
7 take them up before 1:00 o'clock when the Court intends
8 to charge the jury and permit, as a part thereof, final
9 argument by counsel.

10 Also, during the course of the trial, the
11 Plaintiffs moved the Court to expressly direct and
12 authorize the numbering and inclusion of various jury
13 aids that have been generated during the course of the
14 trial or similar demonstratives that have been used
15 before the jury, none of which are exhibits in this
16 case, none of which are evidence admitted into evidence
17 in this case.

18 The Court took that request made by the
19 Plaintiff under advisement. The Court has since
20 considered the same fully and has determined, within the
21 Court's discretion, that that is not something the Court
22 is inclined to do, and therefore, the request by the
23 Plaintiff in that regard is overruled.

24 Is counsel aware of anything else that
25 the Court needs to take up and clarify prior to final

1 instructions and jury argument on Monday afternoon?

2 MR. ZAGER: Nothing for Zynga, Your
3 Honor.

4 MR. HILL: Nor for Plaintiff, Your Honor.

5 THE COURT: All right. I will see you
6 Monday. We'll convene with the jury at 1:00 o'clock.
7 I'll be available, hopefully, at least a couple of hours
8 before that if there are any late-breaking issues that
9 need the Court's attention.

10 With that, Counsel, we stand in recess,
11 and you're excused until Monday.

12 MR. ZAGER: Thank you, Your Honor.

13 COURT SECURITY OFFICER: All rise.

14 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
SHELLY HOLMES, CSR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

Date

/s/_____
SUSAN SIMMONS, CSR
Official Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

Date